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No. 95-1872

In the Supreme Court of the United States

OCTOBER TERM, 1996

WILLIAM STRATE, ASSOCIATE TRIBAL JUDGE, TRIBAL COURT OF THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD INDIAN RESERVATION, ET AL., PETITIONERS

v.

A-1 CONTRACTORS AND LYLE STOCKERT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether an Indian tribal court has jurisdiction to adjudicate a tort suit brought by a non-Indian plaintiff against a non-Indian contractor, hired to do tribal business on the reservation, arising out of an accident that occurred on tribal lands.

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INTEREST OF THE UNITED STATES

The United States is committed to the principles of self-determination and self-government of Indian Tribes. See, *e.g.*, 25 U.S.C. 3601; *Iowa Mutual Ins. Co.* v. *LaPlante*, 480 U.S. 9, 14-15 (1987). Central to tribal sovereignty is the effectiveness of tribal institutions, including tribal courts. See *ibid.* The United States has consistently participated as *amicus curiae* in cases, such as this one, implicating the authority of those courts. See, *e.g.*, *Duro* v. *Reina*, 495 U.S. 676 (1990); *Iowa Mutual*, *supra*; *National Farmers Union Ins. Cos.* v. *Crow Tribe*, 471 U.S. 845 (1985).

STATEMENT

1. Many Indian Tribes have formal tribal court systems to adjudicate disputes arising on their reservations. See generally United States Commission on Civil Rights, *The Indian Civil Rights Act* 29-31 (1991); R. Strickland, et al., *Felix S. Cohen's Handbook of Federal Indian Law* 332-335 (1982). Today, "tribal justice systems are an essential part of tribal governments." 25 U.S.C. 3601(5); accord *Iowa Mutual Ins. Co.* v. *LaPlante*, 480 U.S. 9, 14-15 (1987). Their number has grown sharply in the last 20 years: from 117 in 1976, see *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 65 n.21 (1978), to more than 230 today, see U.S. Dep't of Interior, Bureau of Indian Affairs, *Budget Justifications, F.Y. 1997*, at BIA-57 (1996). At the same time, the number of cases on tribal court dockets has steadily increased, accompanied by corresponding advances in the professional qualifications of tribal judges and lawyers.[1]

a. Tribal courts owe much of their present stature to comprehensive federal assistance designed to ensure their role as appropriate forums for adjudication of disputes arising on Indian reservations. See *Santa Clara Pueblo*, 436 U.S. at 65; see, *e.g.*, 25 U.S.C. 450, 450a (Indian Self-Determination and Education Assistance Act, providing funding and assistance for tribal government institutions, including courts), 476-479 (Indian Reorganization Act,

[1] See Testimony of Hon. William Canby, Chair of the Ninth Circuit Judicial Task Force on Tribal Courts, *Tribal Justice Act: Hearing Before the Senate Comm. on Indian Affairs*, 104th Cong., 1st Sess. 58 (1995) ("Tribal courts today are infinitely more competent and better staffed than they were thirty or even fifteen years ago."); see also Hon. Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 9 Tribal Ct. Rec. 12, 12 (1996) ("The tribal courts, while relatively young, are developing in leaps and bounds.").

providing for establishment of tribal governments), 1301-1311 (Indian Civil Rights Act of 1968, recognizing powers of tribal self-government, establishing "bill of rights," and providing for development of model code of Indian offenses for Indian courts).

In 1993, Congress reaffirmed the United States' commitment to tribal courts by enacting the Indian Tribal Justice Act, Pub. L. No. 103-176, 107 Stat. 2004, which establishes an Office of Tribal Justice Support within the Bureau of Indian Affairs, see 25 U.S.C. 3611-3614, and authorizes an annual appropriation of up to $50 million to support the Office's assistance to tribal courts, see 25 U.S.C. 3621(b). The Act rests on, *inter alia*, the following congressional findings (25 U.S.C. 3601(4)-(6)):

> (4) Indian tribes possess the inherent authority to establish their own form of government, including tribal justice systems;
>
> (5) tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments;
>
> (6) Congress and the Federal courts have repeatedly recognized tribal justice systems as the appropriate forums for the adjudication of disputes affecting personal and property rights.

As the Senate Report explained, "tribal courts are permanent institutions charged with resolving the rights and interests of both Indian and non-Indian individuals." S. Rep. No. 88, 103d Cong., 1st Sess. 8 (1993). The Indian Tribal Justice Act also reflects Congress's understanding "that civil jurisdiction on an Indian reservation 'presumptively lies in tribal court, unless affirmatively limited by a specific treaty provision or federal statute.'" H.R. Conf.

Rep. No. 383, 103d Cong., 1st Sess. 13 (1993) (quoting *Iowa Mutual*, 480 U.S. at 18).[2]

The Department of Justice has also played an important role in fostering the development of tribal courts. See generally DOJ Policy on Indian Sovereignty and Government-to-Government Relations, 61 Fed. Reg. 29,424 (1996); Janet Reno, *A Federal Commitment to Tribal Justice Systems*, 79 Judicature 113 (1995) (symposium on tribal courts). For example, in conjunction with the Federal Judicial Center, the Department of Justice has developed a joint training program for tribal and federal judges on the adjudication of child sexual abuse cases in Indian country. The Department has also designated 45 tribal governments for "Tribal Court-DOJ Partnership Projects," under which local United States Attorneys' offices will provide training for tribal court personnel. See Reno, 79 Judicature at 114.

b. The proficiency of tribal courts in handling complex litigation has led Congress to recognize their jurisdiction to adjudicate important questions of federal law. For example, Congress has affirmed the exclusive jurisdiction of tribal courts to resolve many disputes under the Indian Child Welfare Act of 1978, see 25 U.S.C. 1911(a), and, except in habeas corpus proceedings, to enforce the provisions of the Indian Civil Rights Act, which (among other guarantees) protects the procedural rights of any party to

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[2] See also H.R. Rep. No. 205, 103d Cong., 1st Sess. 8-9 (1993) ("As for non-criminal jurisdiction, Indian tribes have the inherent right to exercise civil jurisdiction within the territory it controls. Tribes exercise a broad range of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest. Hence, non-Indians may be sued in tribal court. * * * The general rule is civil jurisdiction 'presumptively lies in tribal court, unless affirmatively limited by a specific treaty provision or federal statute.'") (quoting *Iowa Mutual*, 480 U.S. at 18).

tribal court proceedings. See *Santa Clara Pueblo* v. *Martinez*, *supra*; see also 12 U.S.C. 1715z-13(g)(5) (authorizing federal government to bring mortgage foreclosure actions against reservation home owners in either tribal court or federal district court). Similarly, Congress's long-standing effort to ensure "the authority of the tribal courts over Reservation affairs," *Williams* v. *Lee*, 358 U.S. 217, 223 (1959), is also manifest in federal legislation requiring tribal consent before a State may assume civil jurisdiction over reservation-related disputes in which an Indian is a defendant.[3]

Perhaps the best evidence of the stature and sophistication of tribal courts is the frequency with which the judgments of those courts are enforced—whether by statute or under principles of comity—in state and federal courts. Most courts agree that no federal statute generally requires full faith and credit for tribal judgments, see *Wilson* v. *Marchington*, 934 F.Supp. 1187, 1189-1190 (D. Mont. 1996); Comment, *Full Reciprocity for Tribal Courts from a Federal Courts Perspective: A Proposed Amendment to the Full Faith and Credit Act*, 45 Emory L.J. 723, 757-761 (1996); see also cases cited in note 4, *infra*,

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[3] Public Law 280, Act of Aug. 15, 1953, ch. 505, 67 Stat. 588, gave five States (not including North Dakota, in which this case arose) jurisdiction over civil and criminal actions involving Indians and arising in Indian country. As amended in 1968, federal law gives all other States the option of assuming similar jurisdiction after receiving tribal consent. See 25 U.S.C. 1321(a), 1322(a), 1326. No Tribe in North Dakota has given such consent. See *Three Affiliated Tribes* v. *Wold Engineering, P.C.*, 467 U.S. 138 (1984) (*Three Affiliated Tribes I*); Sandra Hansen, *Survey of Civil Jurisdiction in Indian Country 1990*, 16 Am. Indian L. Rev. 319, 336 n.124 (1991). As this Court held in *Three Affiliated Tribes I*, federal law does not bar a state court from exercising jurisdiction over a suit brought by an Indian against a non-Indian in a State that has not assumed jurisdiction pursuant to Public Law 280.

although Congress has imposed full-faith-and-credit requirements for specific categories of adjudication, see, *e.g.*, 18 U.S.C. 2265 (domestic violence orders); 25 U.S.C. 1911(d) (child custody orders), 3106(c) (enforcement of National Indian Forest Resources Management Act), 3713(c) (enforcement of American Indian Agricultural Resource Management Act).

Even in the absence of a federal statute specifically requiring full faith and credit, however, state and federal courts have regularly enforced tribal court judgments under principles of comity that incorporate the standards governing the enforcement of foreign court judgments. See *Wilson*, 934 F. Supp. at 1191-1193.[4] Under those principles, a court may condition enforcement of a tribal court's judgment upon a determination that the tribal proceedings were full, fair, and impartial, see *ibid.* (citing *Hilton* v. *Guyot*, 159 U.S. 113, 202 (1895)), and consistent with the enforcing jurisdiction's public policy, see generally *Mexican* v. *Circle Bear*, 370 N.W.2d 737, 740-741 (S.D. 1985) (same). Moreover, several States have codified similar comity standards by rule or statute.[5] Cf. *Wilson*, 934 F.

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[4] Accord *Fredericks* v. *Eide-Kirschmann Ford, Mercury, Lincoln, Inc.*, 462 N.W.2d 164 (N.D. 1990); *Barrett* v. *Barrett*, 878 P.2d 1051 (Okla. 1994); *In re Marriage of Red Fox*, 542 P.2d 918 (Or. Ct. App. 1975); *Gesinger* v. *Gesinger*, 531 N.W.2d 17 (S.D. 1995); *In re Custody of Sengstock*, 477 N.W.2d 310 (Wis. Ct. App. 1991); see also *Wippert* v. *Blackfeet Tribe*, 654 P.2d 512 (Mont. 1982).

[5] See, *e.g.*, Wis. Stat. Ann. § 806.245(4) (West 1994) (state court may examine, *inter alia*, whether tribal court judgment was procured without fraud, duress or coercion; in compliance with the rendering court's procedures; and in compliance with the Indian Civil Rights Act); Wyo. Stat. § 5-1-111(d) (1977) (same); S.D. Codified Laws Ann. § 1-1-25(1) (1992) (party seeking recognition must demonstrate, *inter alia*, that tribal court judgment was obtained after fair notice and fair hearing and is not repugnant to public policy of State); Mich. Ct. R. 2.615(C) (objecting party may resist enforcement by demonstrating, *inter alia*, that tribal court judgment was obtained without fair notice or fair hearing or is repugnant to public policy of State); N.D. Ct. R. 7.2(b) (same); see also Okla. Stat. Ann. tit. 12, § 728 (West 1996); N.M. Stat. Ann. § 40-13-6(D) (Michie 1994) (full faith and credit for tribal court protection orders).

Supp. at 1191-1193 (applying such standards as matter of federal common law).

2. a. This declaratory judgment action challenges the jurisdiction of the Tribal Court of the Three Affiliated Tribes of the Fort Berthold Reservation over a tort suit between non-Indians arising out of an accident on the Tribes' Reservation in west-central North Dakota. In November 1990, an automobile driven by petitioner Gisela Fredericks collided with a gravel truck driven by respondent Lyle Stockert and owned by respondent A-1 Contractors. The accident occurred on a state highway that was constructed under the authority of a right-of-way granted by the Secretary of the Interior and lies on lands held by the United States in trust for the Tribes and their members.[6] The Three Affiliated Tribes (collectively, the Tribe) are federally recognized Indian Tribes that exercise inherent sovereignty over their members and lands under a constitution adopted pursuant to the Indian Reorganization Act, 25 U.S.C. 461-479. See Pet. App. 2-3 & n.2.

Neither Fredericks nor Stockert is an Indian. Fredericks, however, is the widow of a deceased member of the Tribe, has five children who are likewise tribal members,

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[6] In the federal district court proceedings, petitioners alleged that "[t]he state highway runs through trust lands on the reservation pursuant to a federal right-of-way granted under 25 U.S.C. §§ 323-28." Tribal Defendants' Brief in Support of Cross-Motion for Summary Judgment, May 20, 1992, at 26. Respondents have not contested that allegation. Cf. Pet. App. 77 ("The only factual dispute is whether Gisela Fredericks resides on the reservation."). The right-of-way at issue was in the nature of an easement. See 25 C.F.R. 161.18 (1970), redesignated as 25 C.F.R. 169.18 (1996).

owns property on the Reservation, and (according to petitioners, the tribal courts, and the Eighth Circuit) resides there. Pet. 4; Pet. App. 2-3, 74, 89, 102, 104. A-1 Contractors is owned by non-Indians and is based in Dickinson, North Dakota. At the time of the accident, A-1 was working on the Reservation under a subcontract agreement with LCM Corporation, which is wholly owned by the Tribe. A-1 was engaged in the construction of a tribal community building, and it performed all work under the subcontract within the boundaries of the Reservation. *Id.* at 3.[7]

Fredericks suffered serious injuries in the collision. In May 1991, she sued respondents (and A-1's insurer, which was later dropped from the suit) in the Tribe's trial court. As part of the same litigation, her adult children sued respondents for loss of consortium. Respondents entered a special appearance and moved to dismiss the suit on the ground that the tribal court lacked personal and subject-matter jurisdiction. Pet. App. 3-4.

b. The tribal court denied the motion to dismiss. Pet. App. 101-109. The court first held that, as a matter of tribal law, it had personal and subject-matter jurisdiction under the Tribal Code, which authorizes tribal jurisdic-

[7] According to the federal court of appeals, the record is not clear whether Stockert was engaged in work under the subcontract at the time of the collision. See Pet. App. 3 & n.1. The tribal courts, however, resolved the jurisdictional issue on the premise that he was, see Pet. App. 89, 93, 96, 102-103, 105-106, and there is no indication of any other reason why he would have been driving a gravel truck on the Reservation. See generally *FMC* v. *Shoshone-Bannock Tribes*, 905 F.2d 1311, 1313 (9th Cir. 1990) (federal courts should extend deference to tribal court factual determinations relevant to tribal court jurisdiction), cert. denied, 499 U.S. 943 (1991); *Duncan Energy Co.* v. *Three Affiliated Tribes*, 27 F.3d 1294, 1299-1300 (8th Cir. 1994) (same), cert. denied, 115 S. Ct. 779 (1995).

tion over "all civil causes of action arising within the exterior boundaries of the Reservation" and over "all persons who reside, enter, or transact business within the territorial boundaries of the Reservation." *Id.* at 104.

The tribal court then rejected respondents' argument that federal law—and, in particular, this Court's decision in *Montana* v. *United States*, 450 U.S. 544 (1981)—required a different result. *Montana*, the court reasoned, limits the extent to which a Tribe may regulate the activities of non-Indians on alienated fee lands owned by non-Indians; it does not constrain tribal court jurisdiction over disputes arising from activities on reservation lands that have not been alienated from a Tribe. Pet. App. 105. Alternatively, the court held that, even if the underlying accident had occurred on alienated fee lands, Fredericks' claims would still constitute "precisely the type" of civil action that the *Montana* Court deemed "subject to Tribal jurisdiction," *id.* at 106: both because torts within a reservation have "a direct effect on the economic security, health and welfare of the Tribe[] and its members," and because "the tort alleged in the Complaint arises out of the Defendant's consensual business activity within the Reservation." *Id.* at 105-106 (citing *Montana*, 450 U.S. at 565-566).[8]

c. Respondents took an interlocutory appeal of the jurisdictional ruling to the Northern Plains Intertribal Court of Appeals, which affirmed. Pet. App. 87-100. That court agreed with the trial court's determination that the

[8] Neither the tribal court nor any other court has reached the question of the tribal court's jurisdiction over the consortium claims brought by Fredericks' adult children, who are tribal members. See Pet. App. 107. The tribal court's jurisdiction over those claims is therefore not before this Court, even though the pendency of those claims makes it at least possible that, if this case is permitted to proceed in tribal court, some of the parties will be members of the Tribe.

Tribe's legislative code and constitution vested the tribal court with personal and subject-matter jurisdiction in this case. *Id.* at 94-95. The court further held that whether the Tribe has authority under federal law to exercise civil adjudicatory jurisdiction over non-Indians is controlled, not by *Montana*, but by *Iowa Mutual Insurance Co.* v. *LaPlante*, 480 U.S. 9 (1987), which held that civil jurisdiction over the activities of non-Indians on a reservation "presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." *Id.* at 18. "Like any sovereign," the court explained, the Tribe "has an interest in providing a forum for peacefully resolving disputes that arise in [its] geographic jurisdiction and protecting the rights of those who are injured within such jurisdiction." Pet. App. 93. The Intertribal Court of Appeals therefore remanded the case to the trial court for further proceedings. *Id.* at 97.

3. Before proceedings resumed in tribal court, respondents filed this action in the United States District Court for the District of North Dakota. Respondents sought a declaratory judgment that the tribal court lacked personal and subject-matter jurisdiction as a matter of federal law, as well as an injunction against further proceedings in tribal court. The complaint named Fredericks, her adult children, the tribal court judge (Hon. William Strate), and the tribal court itself as defendants. Both sides moved for summary judgment.

a. The district court granted summary judgment for petitioners. Pet. App. 73-86. As a preliminary matter, the court held that it had jurisdiction over respondents' action under 28 U.S.C. 1331, and that respondents had exhausted their tribal court remedies before seeking relief in federal court. Pet. App. 74. See generally *National Farmers Union Ins. Cos.* v. *Crow Tribe*, 471 U.S. 845 (1985). The district court also concluded that the case was ripe for

summary judgment because the parties' only factual dispute concerned the status of Fredericks' residency on the Reservation, an issue that respondents had not raised in tribal court and that the district court deemed immaterial. Pet. App. 77. The district court then held that the tribal court's assumption of jurisdiction complied with federal law because, under *Iowa Mutual*, "Tribal Courts have civil jurisdiction over non-Indians unless specifically limited by treaty or federal statute." *Id.* at 82.

b. Respondents appealed to the United States Court of Appeals for the Eighth Circuit on one issue only: whether the tribal court could exercise subject-matter jurisdiction over Fredericks' claim. A divided panel of the court of appeals affirmed the district court. Pet. App. 50-72.

The panel held that "the general divestiture of tribal civil jurisdiction over the activities of non-Indians recognized in *Montana* is applicable only to fee lands owned by non-Indians," Pet. App. 59, a circumstance not presented here. Thus, because "no specific treaty provision or federal statute has been shown to have affirmatively limited the power of the tribal courts over civil actions that arise on the reservation between non-Indians," the panel concluded that, under *Iowa Mutual*'s "presumpti[on]" of tribal court jurisdiction, see 480 U.S. at 18, the Tribe had authority to adjudicate the underlying tort suit. Pet. App. 61.

In the alternative, the panel held that, even if *Montana*'s limits on tribal sovereignty were applicable, this case would fall within each of the two categories of activities as to which "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." Pet. App. 56 (quoting *Montana*, 450 U.S. at 565-566). First, the panel found that "a 'consensual relationship' existed between appellants and the tribe by virtue of

the subcontract between A-1 and LCM Corp.," and that "[t]he allegedly tortious conduct * * * occurred in connection with the performance of the subcontract on the reservation." *Id.* at 61 (quoting *Montana*, 450 U.S. at 565). Second, the panel held that the Tribe's exercise of adjudicatory jurisdiction followed from its sovereign power to protect "the health and safety of its members and residents on the roads and highways on the reservation." *Id.* at 62-63. Finally, the panel observed that the tribal court's yet-unmade choice-of-law determination was irrelevant to the jurisdictional inquiry: "Whether the tribal court has subject matter jurisdiction is not controlled by whether the applicable substantive law is tribal law or state law or federal law. Courts often adjudicate disputes under substantive law different than that of the forum." *Id.* at 63.

c. On rehearing en banc, the Eighth Circuit reversed the judgment of the district court, holding that the tribal court lacked subject-matter jurisdiction over Fredericks' suit. Pet. App. 1-48.

The en banc court held that *Montana* governs a tribal court's jurisdiction over civil disputes between nonmembers arising on a reservation. Pet. App. 8. In the court's view, *Montana* established a "general principle that 'the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe,'" regardless of where those activities take place on the reservation. *Ibid.* (quoting *Montana*, 450 U.S. at 565). The court rejected petitioners' separate arguments that the *Montana* analysis restricts tribal authority only with respect to non-Indian activities on non-Indian fee lands, *id.* at 15, and only with respect to the enforcement of substantive rules of conduct, as distinguished from the adjudication of civil disputes, *id.* at 16-18.

The en banc court acknowledged, but deemed inapplicable, the two situations in which *Montana* permits the

exercise of tribal authority over non-Indians. As to *Montana*'s provision for tribal regulation of those who enter into "consensual relationships" with the Tribe, see 450 U.S. at 565, the court held that "[t]he dispute in this case is a simple personal injury tort claim arising from an automobile accident, not a dispute arising under the terms of, out of, or within the ambit of" A-1's subcontract with the Tribe. Pet. App. 21. And as to *Montana*'s provision for tribal regulation of non-Indian activities with a "direct effect" on tribal welfare, see 450 U.S. at 566, the court concluded that petitioners "completely failed to show that the tribe's ability to govern or protect its own members would be directly damaged if the tribe cannot assert jurisdiction over this lawsuit." Pet. App. 24.

Four judges dissented from the Eighth Circuit's holding. Pet. App. 24-48.

SUMMARY OF ARGUMENT

"Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty," and civil jurisdiction over those activities thus "presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." *Iowa Mutual Ins. Co.* v. *LaPlante*, 480 U.S. 9, 18 (1987). Because no treaty provision or Act of Congress has withdrawn that aspect of the Tribe's sovereignty here, the tribal court properly exercised jurisdiction over the underlying tort suit. That exercise of jurisdiction comports with this Court's consistent recognition that tribal courts are appropriate forums for adjudicating the rights of non-Indians in civil disputes arising on reservation lands, just as state courts are appropriate forums for adjudicating the rights of non-residents in civil disputes arising within each State.

That the tribal court may exercise adjudicatory jurisdiction over this dispute does not necessarily mean that the tribal court should apply tribal law, as opposed to North Dakota state law, as its substantive rule of decision. That choice-of-law question, analogous to similar issues commonly resolved by state courts exercising adjudicatory jurisdiction over disputes between non-residents, is appropriately addressed to the tribal court in the first instance, cf. *National Farmers Union Ins. Cos.* v. *Crow Tribe*, 471 U.S. 845 (1985), and is not now before this Court. For that reason alone, this case is distinguishable from *Montana* v. *United States*, 450 U.S. 544 (1981), and its progeny. Those cases limit only the scope of a Tribe's power to impose substantive rules of conduct on non-Indians, not a tribal court's power to adjudicate disputes under substantive rules—whether arising under tribal, state, or federal law—that are consistent with *Montana* and applicable choice-of-law principles.

This case is distinguishable from *Montana* for a second reason as well. Like its progeny, *Montana* does not restrict, and in fact reaffirms, the inherent power of Tribes to regulate the conduct of non-Indians on tribal lands: *i.e.*, lands owned by, or held in trust for, the Tribe or its members. See 450 U.S. at 557. The only tribal power that *Montana* limits is the authority to regulate non-Indian activities on alienated reservation lands owned in fee simple by non-Indians. See *id.* at 557, 563. In this case, by contrast, petitioner Fredericks' claim arose on a road, maintained by the State pursuant to a right-of-way granted by the Secretary of the Interior, that lies on land held in trust for the Tribe and its members.

Finally, even if the tribal court's exercise of adjudicatory jurisdiction constituted a form of substantive regulation, which it does not, and even if the accident occurred on non-Indian fee lands, which it did not, tribal court jurisdiction over this case would still comport with *Montana*. In that case, this Court recognized that a Tribe may regulate the activities of non-Indians, "even on non-Indian fee lands," in at least two circumstances: where the conduct of non-Indians "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe," and where non-Indians "enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." 450 U.S. at 565-566. Each of those circumstances is presented here. This case involves not just the Tribe's general authority to adjudicate claims of hazardous driving on reservation roads, but, more specifically, the Tribe's ability to adjudicate claims of hazardous driving by commercial enterprises that, like A-1, "avail themselves of the substantial privilege of carrying on business on the reservation." *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 137-138 (1982) (internal quotation marks omitted).

ARGUMENT

I. CIVIL ADJUDICATORY JURISDICTION OVER RESERVATION AFFAIRS, INCLUDING DISPUTES BETWEEN NON-INDIANS ARISING ON A RESERVATION, PRESUMPTIVELY LIES IN THE TRIBAL COURTS IN THE ABSENCE OF A CONTRARY TREATY OR ACT OF CONGRESS

A. Indian Tribes are sovereign political entities with inherent jurisdiction "over both their members and their territory." *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983) (quoting *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 142 (1980), and *United States* v. *Mazurie*, 419 U.S. 544, 557 (1975)); accord *United States* v. *Wheeler*, 435 U.S. 313, 322 (1978); *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 547-549 (1832). For that rea-

son, this Court recognizes that tribal courts are "appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians," *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 65 (1978), and it has likewise rejected attacks on the institutional competency of tribal courts as "contrary to * * * congressional policy," *Iowa Mutual Ins. Co.* v. *LaPlante*, 480 U.S. 9, 19 (1987), and to this Court's precedents, see *Santa Clara Pueblo*, 436 U.S. at 65-66; see also 25 U.S.C. 3601 *et seq.*

This Court has therefore upheld the exercise of tribal court civil jurisdiction in a variety of contexts affecting the rights of non-Indians.[9] It has held that tribal courts have exclusive jurisdiction to adjudicate a non-Indian's legal rights against Indians for matters arising on a reservation, see *Williams* v. *Lee*, 358 U.S. 217 (1959); see also *Kennerly* v. *District Court*, 400 U.S. 423 (1971) (per curiam), and (except in habeas corpus proceedings) to enforce the federal guarantees, applicable both to Indians and to non-Indians, of the Indian Civil Rights Act, 25 U.S.C. 1301 *et seq.*, see *Santa Clara Pueblo*, 436 U.S. at 65-66. Moreover, to ensure "comity" among courts and to "[p]romot[e] * * * tribal self-government and self-determination," this Court has required non-Indian defendants in tribal court suits to exhaust tribal remedies before challenging the jurisdiction of the tribal court in

[9] In some contexts, Indian parties who do not belong to the Tribe whose authority they resist may stand in the same legal position as non-Indian parties. See, *e.g.*, *Duro* v. *Reina*, 495 U.S. 676 (1990); cf. Pub. L. No. 101-511, § 8077(b), 104 Stat. 1892, 25 U.S.C. 1301(2) (post-*Duro* legislation defining "powers of self-government" to include "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians"). Because no non-member Indians are involved in this lawsuit, this brief simply distinguishes between Indian and non-Indian parties.

federal court. See *Iowa Mutual*, 480 U.S. at 15; *National Farmers Union Ins. Cos.* v. *Crow Tribe*, 471 U.S. 845, 856 (1985). That requirement presupposes that a tribal court often may, in fact, exercise jurisdiction against non-Indian defendants (even where they resist it) to adjudicate disputes arising on the reservation; indeed, this Court made clear that such disputes "presumptively" lie within tribal jurisdiction. See *Iowa Mutual*, 480 U.S. at 18.[10]

[10] It seems clear that the state courts in North Dakota also would have jurisdiction over the underlying tort suit. In *Three Affiliated Tribes* v. *Wold Engineering, P.C.*, 467 U.S. 138 (1984), this Court held that a state court has jurisdiction over a suit brought by the Tribe itself against a non-Indian arising out of a contract for construction work on the Reservation. It follows *a fortiori* that a state court would have jurisdiction over a suit against a non-Indian where the plaintiff is also a non-Indian. Cf. *United States* v. *McBratney*, 104 U.S. 621 (1881) (State, rather than United States, had jurisdiction to prosecute criminal offense committed by one non-Indian against another non-Indian in Indian country). That premise also underlies Public Law 280 (see note 3, *supra*), which provides for "any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State" to assume such jurisdiction, with the consent of the Tribe. See 25 U.S.C. 1322(a). The absence of a provision in Public Law 280 for States to assume jurisdiction over disputes to which Indians are *not* parties indicates that the States already had that jurisdiction.

The existence of state court jurisdiction does not, however, suggest that tribal courts do not also have jurisdiction over such a dispute. Concurrent jurisdiction is common in many contexts, see, *e.g.*, *Yellow Freight Sys., Inc.* v. *Donnelly*, 494 U.S. 820 (1990), and this Court has recognized that state and tribal courts may have concurrent jurisdiction over suits against non-Indian defendants for matters arising on the Reservation, see *Three Affiliated Tribes* v. *Wold Engineering, P.C.*, 476 U.S. 877, 888-889 (1986). Accordingly, nothing in federal law would have barred petitioner Fredericks from suing respondents in state court in the first instance. In the case of an ordinary private civil dispute that does not itself challenge the exercise of power by the tribal government—and where there is not already a case pending in the

By contrast, tribal courts lack criminal jurisdiction over non-Indians. See *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978); see also *Duro* v. *Reina*, 495 U.S. 676 (1990). But the scope of a tribal court's civil jurisdiction "is not similarly restricted," *Iowa Mutual*, 480 U.S. at 15, both because criminal prosecution "involves a far more direct intrusion on personal liberties" than does an exercise of civil jurisdiction, *Duro*, 495 U.S. at 687-688, and because Congress has manifested an intent to preserve broader tribal authority over civil cases than over criminal cases, see *National Farmers Union*, 471 U.S. at 854-855 & nn.16-17 (Indian Tribes retain broad inherent sovereignty with respect to civil, but not criminal, matters); *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152-154 (1980) (similar); see also 25 U.S.C. 3601 *et seq.*

B. This case is similar to *Iowa Mutual* and *National Farmers Union* in that all three cases involve challenges by non-Indian defendants to tribal court jurisdiction.

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tribal court arising out of the same dispute—we do not believe that *National Farmers Union* or *Iowa Mutual* displaces the usual rule that a plaintiff may select the forum in which the suit will be filed. By contrast, where a private plaintiff challenges an exercise of taxing or regulatory authority by the Tribe itself, we believe that the plaintiff ordinarily must first present its objections to the tribal administrative agency and then to the tribal court. See, *e.g.*, *Middlemist* v. *Babbitt*, 19 F.3d 1318 (9th Cir.), cert. denied, 115 S. Ct. 420 (1994). Where the United States is the plaintiff, we do not believe that prior resort to tribal forums is necessary even in that situation. But see *United States* v. *Tsosie*, 92 F.3d 1037 (10th Cir. 1996) (affirming dismissal under "exhaustion" doctrine of ejectment action brought by United States in federal district court under 28 U.S.C. 1345 against individual Indian occupying land allotted by United States to another Indian, even where no parallel action was pending against United States in tribal court and where no such action could be brought in tribal court without waiver of United States' sovereign immunity there).

Here, however, the plaintiff invoking tribal court jurisdiction is also a non-Indian. The question presented is therefore not whether tribal courts may exercise civil jurisdiction over non-consenting non-Indians—this Court's decisions in *Iowa Mutual* and *National Farmers Union* rest on the premise that tribal courts often do have such jurisdiction, see *Iowa Mutual*, 480 U.S. at 18—but whether the absence of an Indian party divests a tribal court of jurisdiction over a civil dispute arising in Indian country.

In our view, *Iowa Mutual* provides the answer to that question. There, this Court held that, because "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty[,] [c]ivil jurisdiction over such activities *presumptively lies in the tribal courts* unless affirmatively limited by a specific treaty provision or federal statute." 480 U.S. at 18 (emphasis added; citations omitted). Congress also understood that to be the operative presumption when it enacted the Indian Tribal Justice Act in 1993. See H.R. Conf. Rep. No. 383, 103d Cong., 1st Sess. 13 (1993) (quoted on p. 3, *supra*). That presumption governs this case. We are not aware of, and the parties have not cited, any treaty provision or Act of Congress that impairs the Tribe's sovereign authority to adjudicate disputes arising on the Reservation. "Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence is that the sovereign power remains intact." *Iowa Mutal*, 480 U.S. at 18 (ellipses omitted) (quoting *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 149 n.14 (1982)).

Indeed, the power to adjudicate disputes arising within territorial limits is a defining attribute of sovereignty. Justice Story's maxim that "every nation may . . . rightfully exercise jurisdiction over all persons within its domains," *Burnham* v. *Superior Court*, 495 U.S. 604, 611

(1990) (plurality opinion) (quoting J. Story, *Commentaries on the Conflict of Laws* §§ 554, 543 (1846)), has become one of "the most firmly established principles of personal jurisdiction in American tradition," *id* at 610. Similarly, "[a] state has an especial interest in exercising judicial jurisdiction over those who commit torts within its territory. This is because torts involve wrongful conduct which a state seeks to deter, and against which it attempts to afford protection, by providing that a tortfeasor shall be liable for damages which are the proximate result of his tort." *Keeton* v. *Hustler Magazine, Inc.*, 465 U.S. 770, 776 (1984) (quoting *Leeper* v. *Leeper*, 319 A.2d 626, 629 (N.H. 1974)); see also *Carroll* v. *Lanza*, 349 U.S. 408 (1955).

Like a State, an Indian Tribe has "an especial interest" in exercising civil jurisdiction to deter and remedy wrongful conduct within its territory. That interest is particularly strong where, as here, both the perpetrators and the victims of the conduct at issue have close ties to the reservation and the tribal community. Cf. *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945). Just as one State may provide a forum for the adjudication of civil disputes arising within that State between citizens of another State, so too does a Tribe retain sovereign authority to exercise jurisdiction (concurrent with that of the State, see note 10, *supra*) over civil disputes arising within the reservation between non-Indians.

C. That a tribal court may exercise adjudicatory jurisdiction over such suits does not necessarily mean that, in any given case, the Tribe would or could impose its own substantive law as the rule of decision. Under traditional choice-of-law principles, courts of one sovereign often adjudicate disputes using the substantive law of another sovereign. That practice reflects the constitutional principle that a sovereign's adjudicatory jurisdiction commonly exceeds its power to impose substantive rules of

conduct. See *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 821-822 (1985); *Allstate Ins. Co.* v. *Hague*, 449 U.S. 302 (1981); see also *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 813-814 (1993) (Scalia, J., dissenting in part); cf. *Shaffer* v. *Heitner*, 433 U.S. 186, 215 (1977).[11]

Here, the tribal courts have not addressed whether state or tribal law (or both) would be applicable in the substantive resolution of the underlying tort suit.[12] That

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[11] Felix S. Cohen, *Handbook of Federal Indian Law* (1942), states that, in fields in which a Tribe has legislative or executive authority, "the judicial powers of the tribe are coextensive with its legislative or executive powers." *Id.* at 145; accord *Powers of Indian Tribes*, 55 Interior Dec. 14, 56 (1934). Those sources do not state that the existence of executive or legislative authority is a necessary condition for a Tribe's exercise of adjudicatory jurisdiction over civil disputes involving non-Indians.

[12] It is, for example, an open question whether the Tribe's law (in the absence of applicable federal choice-of-law requirements) would authorize the tribal court to apply state law as the rule of decision. Many tribal codes expressly authorize application of state law in tribal proceedings. See, *e.g.*, Sisseton-Wahpeton Tribal Code, ch. 33, § 1 (1982) (*quoted in* Frank Pommersheim, *Braid of Feathers: American Indian Law and Contemporary Tribal Life* 228 n.119 (1995)); cf. *Jones* v. *Meehan*, 175 U.S. 1, 28-32 (1899) (application of tribal law in federal proceedings). By contrast, Section 2.5(4) of the Code of the Three Affiliated Tribes provides that "[s]tate and federal laws not applicable to the Three Affiliated Tribes or the Fort Berthold Reservation shall not be deemed applicable law in any proceeding." That language leaves unresolved not only which "state laws" are "not applicable to the * * * Tribes," but also the extent to which a tribal court may incorporate the substance of state law to fill interstices in tribal law. Moreover, for the reasons discussed in the text, federal law may require tribal courts to apply state law in certain contexts, notwithstanding tribal law to the contrary. See p. 23, *infra*. There is no suggestion in this case that federal law would furnish the rules of decision in the adjudication of the underlying tort suit. Where federal law does govern the underlying conduct, tribal courts, like state courts, must apply federal law.

choice-of-law issue, which is properly resolved by the tribal courts in the first instance, see generally *National Farmers Union*, *supra*; *Stock West Corp.* v. *Taylor*, 964 F.2d 912, 920 (9th Cir. 1992) (en banc), is not now before this Court. Moreover, because that issue "presents itself in the course of litigation only after jurisdiction over respondent[s] is established, * * * choice-of-law concerns should [not] complicate or distort the jurisdictional inquiry." *Keeton*, 465 U.S. at 778.

For that reason alone, this case is distinguishable from *Montana* v. *United States*, 450 U.S. 544 (1981), and its progeny: *South Dakota* v. *Bourland*, 508 U.S. 679 (1993), and *Brendale* v. *Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989). *Montana*, *Bourland*, and *Brendale* each addressed the scope of a Tribe's power to enact substantive rules governing the conduct of non-Indians on alienated reservation lands owned in fee simple by non-Indians. In each case, this Court held that, as a matter of federal common law, a Tribe presumptively lacks that power except where non-Indians "enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements," or where the conduct of non-Indians "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 565-566; cf. *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U.S. at 153-154 (Tribes retain inherent powers to tax "non-Indians entering the reservation to engage in economic activity").

Montana and its progeny therefore restrict a Tribe's power to regulate non-Indians; they do not address a Tribe's distinct power to adjudicate disputes involving non-Indians. Analogously, constitutional restrictions on a State's power to impose substantive rules of conduct on

non-residents do not themselves limit the State's independent authority to adjudicate disputes between non-residents under the laws of other States or of the United States. See, *e.g.*, *Shutts*, 472 U.S. at 821-822; see also *Tafflin* v. *Levitt*, 493 U.S. 455, 458 (1990); *Testa* v. *Katt*, 330 U.S. 386 (1947). The *Montana* analysis is therefore applicable to tribal court proceedings only insofar as it restricts a tribal court's authority to impose substantive tribal law on non-Indians. See generally *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959) ("regulation can be as effectively exerted through an award of damages as through some form of preventive relief"). Specifically, with respect to conduct on alienated fee lands, *Montana* would generally require a tribal court to apply state law to the conduct of non-Indian defendants unless the tribal court determines that imposition of tribal law would be more appropriate either because the defendants have "enter[ed] consensual relationships with the tribe or its members" or because their conduct could have some "direct effect" on the Tribe's well-being. See 450 U.S. at 565-566.[13]

Montana does not, however, restrict the adjudicatory jurisdiction of a tribal court to resolve disputes arising on a reservation under substantive rules of decision that *are*

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[13] Arguably, a tribal court's choice-of-law determination, to the extent that it implicates the federal legal principles set forth in *Montana*, could be subject to review in federal court once tribal remedies are exhausted. Such review would ensure enforcement of those principles without unduly threatening the sovereignty of tribal courts. Cf. *Iowa Mutual*, 480 U.S. at 19 ("proper deference to the tribal court system" bars relitigation of merits issues, but not jurisdictional issues, already resolved in tribal court); *Stock West Corp.*, 964 F.2d at 920 (abstaining from choice-of-law determination relevant to jurisdictional issue because that determination should be undertaken by tribal court "in the first instance").

consistent with *Montana*'s restrictions on the scope of a Tribe's law-making authority. That is why in *Iowa Mutual*, decided several years after *Montana*, this Court perceived no tension between *Montana* and the principle that civil adjudicatory jurisdiction over non-Indians "presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." 480 U.S. at 18. But see *Yellowstone County* v. *Pease*, 96 F.3d 1169, 1175-1176 (9th Cir. 1996) (following Eighth Circuit's decision on this point).

II. EVEN IF THE *MONTANA* ANALYSIS WERE APPLICABLE TO A TRIBAL COURT'S ADJUDICATORY JURISDICTION OVER NON-INDIANS, THE TRIBAL COURT WOULD STILL HAVE JURISDICTION OVER THIS DISPUTE

Even if a tribal court's exercise of adjudicatory jurisdiction were deemed equivalent (for purposes of the *Montana* analysis) to the imposition of substantive tribal law, the tribal court in this case would nonetheless retain jurisdiction over the underlying suit.

A. In the absence of a contrary treaty or Act of Congress, an Indian Tribe retains plenary sovereign authority, both legislative and adjudicatory, over all Indian and non-Indian activities on tribal lands—*i.e.*, lands owned by, or held by the United States in trust for, the Tribe or its members. For that reason, the *Montana* Court sustained a Tribe's inherent authority to regulate hunting and fishing by non-Indians on tribal lands. 450 U.S. at 557. The Court invalidated those regulatory measures only to the extent that the Tribe sought to enforce them against non-Indian hunting or fishing on alienated reservation lands that non-Indians held in fee simple. *Id.* at 559-560 & n.9.

This Court has subsequently applied the *Montana* presumption only against tribal regulation of non-Indian activities on alienated fee lands. It has never applied that presumption to restrict tribal regulation of non-Indian activities on tribal lands, in which a Tribe retains a core sovereignty interest. See *Bourland*, *supra* (invalidating tribal regulation of non-Indian activities on land alienated from Tribe for flood control purposes); *Brendale*, *supra* (invalidating tribal zoning ordinances as applied to most fee lands owned by non-members, but upholding those ordinances as applied to "closed" reservation area consisting of federal trust lands and scattered fee lands); *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 330-331 (1983) (invalidating application of state law to on-reservation activities of non-Indians because, "[u]nlike this case, *Montana* concerned lands located within the reservation but *not* owned by the Tribe or its members"); see also *United States ex rel. Morongo Band of Mission Indians* v. *Rose*, 34 F.3d 901, 906 (9th Cir. 1994) (*Montana* exceptions are "relevant only after the court concludes that there has been a general divestiture of tribal authority over non-Indians by alienation of the land"); but cf. *Yellowstone County*, 96 F.3d at 1174-1175.

For that reason, even if the Tribe's regulatory authority (as distinguished from its adjudicatory jurisdiction) were at issue in this case, the *Montana* presumption against the exercise of that authority over non-Indians would be inapplicable.[14] According to petitioners' unrebut-

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[14] In our view, therefore, federal law would likely permit the tribal court, if it so chooses, to apply the Tribe's substantive law in the underlying tort suit, and any suggestion to the contrary in the court of appeals' analysis of *Montana* (as part of the court's disposition of the jurisdictional issue) was erroneous. In any event, for the reasons discussed in Part I above, the tribal court's subject-matter jurisdiction

ted claim, see note 6, *supra*, the road on which the automobile accident at issue occurred lies on tribal trust lands, not on alienated fee lands. To be sure, that road is a state highway created pursuant to a federally authorized right-of-way. But that right-of-way does not divest the Tribe of its beneficial ownership in the trust lands over which the right-of-way runs, see generally *United States* v. *Shoshone Tribe*, 304 U.S. 111, 117-118 (1938), and the Act of Congress authorizing the right-of-way, 25 U.S.C. 323-328, cannot be construed to impair the powers of tribal sovereignty that follow from the Tribe's beneficial ownership. See *Santa Clara Pueblo* v. *Martinez*, 436 U.S. at 60 (absent "clear indications" of contrary congressional intent, Act of Congress should be construed to preserve tribal sovereignty). As discussed above, those powers include the Tribe's plenary authority to regulate the conduct of non-Indians on tribal lands. See *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. at 136-144 (Tribe has power to tax non-Indians on tribal lands even where Tribe lacks power to exclude them); *Burlington Northern R.R.* v. *Blackfeet Tribe*, 924 F.2d 899 (9th Cir. 1991) (railroad right-of-way through trust land did not divest Tribe of its power to tax activities of non-Indians on tribal lands), cert. denied, 505 U.S. 1212 (1992); *Ortiz-Barraza* v. *United States*, 512 F.2d 1176, 1180 (9th Cir. 1975) (state "[r]ights of way running through a reservation remain part of the reservation and within the territorial jurisdiction of the tribal police"); *State* v. *Webster*, 338 N.W.2d 474, 479-480 (Wis. 1983) (right-of-way for state highway does not extinguish tribal interest in underlying land); *State* v. *Begay*, 320 P.2d 1017 (N.M.) (same), cert. denied, 357 U.S. 918 (1958); see also *United States* v. *Mitchell*, 463 U.S. 206, 223-225 (1983).

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does not turn on resolution of the federal principles delimiting the tribal court's choice-of-law determination.

B. Finally, even if the tribal court's exercise of adjudicatory jurisdiction over disputes involving non-Indians could be equated with substantive regulation of non-Indians' primary conduct, and even if the road on which the accident occurred could be equated with alienated fee land owned by non-Indians, the tribal court still would have jurisdiction over the underlying tort suit. In *Montana*, this Court noted that a Tribe may impose substantive rules of conduct on the activities of non-Indians—"even on non-Indian fee lands"—in at least two circumstances: where non-Indian conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe," and where non-Indians "enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." 450 U.S. at 565-566. This case presents both of those circumstances.

First, the tribal court correctly determined that vehicular negligence, "as alleged in the Complaint, certainly * * * has a direct effect on the economic security, health and welfare of the Tribe[] and its members." Pet. App. 105-106. Indeed, few matters would appear more appropriate for substantive regulation by any sovereign than protection of its own citizens against tortious conduct. See *Webster*, 338 N.W.2d at 482 (upholding tribal interest in regulating traffic on state right-of-way crossing through reservation); *State* v. *Schmuck*, 850 P.2d 1332 (Wash.) (Tribes have inherent sovereign power, under *Montana* "direct effects" test, to stop and detain non-Indian drivers suspected of drunk driving on public right-of-way crossing through reservation), cert. denied, 510 U.S. 931 (1993); see also *Hinshaw* v. *Mahler*, 42 F.3d 1178 (9th Cir.), cert. denied, 115 S. Ct. 485 (1994); *Ortiz-Barraza*, 512 F.2d at 1179-1180. If (as we believe) a Tribe may post and enforce speed limits against all drivers on reservation roads, see

Confederated Tribes of Colville Reservation v. *Washington*, 938 F.2d 146, 149 (9th Cir. 1991), cert. denied, 503 U.S. 997 (1992); *Webster*, 338 N.W.2d at 482, it may also deter and remedy dangerous vehicular conduct through adjudication of civil disputes. See p. 23, *supra*.

The court of appeals appeared to hold that, for purposes of establishing a tribal court's jurisdiction over a tort committed by a non-Indian on a reservation, the *Montana* "direct effects" test requires a showing that the tort's ultimate victim happened to be an Indian, even if the type of tortious conduct at issue poses a broad threat to anyone on the reservation, Indian or non-Indian. Pet. App. 21-24. That is incorrect. If *Montana* were construed to bar a Tribe from regulating a category of tortious acts whose threat to the common tribal welfare is fully apparent only when those acts are viewed in the aggregate, the "direct effects" exception would effectively prohibit the Tribe from enforcing uniform safe-driving standards throughout its Reservation. But all sovereigns, including Indian Tribes, have an inherent interest in deterring (and remedying) negligent acts that make the sovereign's territory a more dangerous place to live and work. See *Nevada* v. *Hall*, 440 U.S. 410, 424 (1979) (affirming State's "substantial" interest in "providing full protection to those who are injured on its highways through the negligence of both residents and nonresidents") (internal quotation marks omitted); *Schmuck*, 850 P.2d at 1341; *Webster*, 338 N.W.2d at 482; see also *Carroll* v. *Lanza*, 349 U.S. 408 (1955) (affirming State's authority to apply its own substantive law in adjudicating tort suit between nonresidents arising out of injuries sustained within State); see generally *Keeton* v. *Hustler Magazine, Inc.*, 465 U.S. at 776.

Second, even if the Tribe lacked authority to regulate all traffic on highways crossing through tribal land, it

would nonetheless retain the power to regulate the conduct of those who have established "consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565. Here, respondent A-1 Contractors entered into a subcontract agreement with a tribally owned company, and A-1's performance under that agreement took place exclusively within reservation boundaries. At the time of the accident, A-1's employee, respondent Lyle Stockert, was driving a gravel truck that A-1 operated on the Reservation, apparently for use in the construction project. See note 7, *supra*.

Despite those facts, however, the court of appeals found the "consensual relationship" test inapplicable because the subject matter of the underlying tort suit does not "aris[e] under the terms of, out of, or within the ambit of" A-1's subcontract with the Tribe. Pet. App. 21. That position is without merit. A Tribe has plenary authority to regulate non-Indians who "avail themselves of the substantial privilege of carrying on business on the reservation"—who, like the Tribe's own members, "benefit from the provision of police protection and other governmental services, as well as from the advantages of a civilized society that are assured by the existence of tribal government." *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. at 137-138 (internal quotation marks omitted); see also *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U.S. at 153-154. Those who do business on the Reservation cannot reasonably expect to enjoy those benefits without also submitting to the Tribe's authority to apply evenhanded rules of conduct to everyone, Indians and non-Indians alike, who have chosen to take part in reservation life.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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